RECENT ENGLISH DECISIONS.

High Court of Justice, Queen's Bench Division.

CUNDY v. LE COCQ.

Where a licensed person was charged, under section 13 of the Licensing Act 1872, with having sold intoxicating liquor to a drunken person and convicted, but it was proved that neither the licensed person nor his servants had noticed that the person served was drunk, there being no apparent indications of intoxication, *Held*, that the licensed person was properly convicted, it being no defence to show that neither the appellant nor his servants knew, or had the means of knowing, that the person served was drunk.

CASE stated under 20 & 21 Vict., c. 43.

At the West Ham Police Court on the 1st of February 1884, the appellant was charged by the respondent, under section 13 of the Licensing Act 1872, for that he, being the keeper of certain licensed premises, had, on the 14th of January 1884, sold intoxicating liquor to a drunken person.

It was proved that there had been a sale of intoxicating liquor, and that the person served was drunk, but it was also proved, in answering the complaint, that neither the appellant nor his servants had noticed that the person served was drunk, and that the drunken person, while in the licensed premises, had been quiet in his demeanor, and had done nothing to indicate insobriety, the evidence showing that there were no apparent indications of intoxication.

Upon the evidence, it was contended for the appellant, that there was nothing to show any knowledge or means of knowledge, on the part of the appellant or his servants, that the person served was drunk.

The magistrate convicted the appellant, holding that the offence was complete with proof that a sale had taken place, and that the person served was drunk, and that it was unnecessary to determine whether the appellant or his servants knew, or had the means of knowing, that the person served was drunk, or could, with ordinary care, have detected the drunkenness.

The question for the court was whether the decision was right.

Section 13 of 35 & 36 Vict., c. 94, provides: "If any licensed person permits drunkenness, or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty," &c.

Besley, for the appellant.

R. S. Wright, for the respondent.

STEPHEN, J.—This conviction must be affirmed. The case turns upon the question whether the words of section 13, taken in consideration with the general scheme of the act, imply that the person who sells the intoxicating liquor to a drunken person must know, or have reasonable means of knowing, that the person served was drunk, or whether the words amount to an absolute prohibition against selling intoxicating liquor to a drunken person. I am of opinion that the latter is the true construction, and that it is only a ground for mitigation of punishment if the publican did not know, or had not reasonable means of knowing, that the person served was drunk.

What chiefly leads me to this conclusion is that knowledge is expressly made an element in some of the offences under this part of the act and not in others. For instance, by section 14, knowingly permitting his premises to be the habitual resort of reputed prostitutes; and, by section 16, knowingly harboring any constable. I believe that the object of omitting the word "knowingly," in this part of the section, was to throw upon the landlord the duty of finding out whether a person served is drunk or not, and the effect of it is that, if a person served is drunk, the landlord or his servants must find that out, or take the risk of serving such a person.

But it has been urged that the old maxim of the criminal law, that there must be a "guilty mind" in the accused person before he can be convicted, applies. This maxim seems to have come into use when the criminal law was in a very undefined state for the guidance of those who administered that law. In some crimes a guilty mind is a necessary ingredient, but those crimes have now been defined, and so the old maxim has been superseded by the precise definitions of most crime, and, at the present day, whether a guilty mind is a necessary ingredient in any particular offence turns upon the words of each definition or of each statute. That knowledge, or guilty mind, is not always a necessary ingredient was decided in *Reg.* v. *Prince;* and the case of *Reg.* v. *Bishop* is very much to the same effect. The object of this part of the thirteenth section is to preclude all discussion as to whether the publican or his servants knew, or might reasonably have known, that the person served was drunk at the time, the publican taking

the risk of the person's having been drunk upon himself. This conviction was right.

MATHEW, J.—I am of the same opinion. The language of the act is perfectly clear. I am satisfied that if Mr. *Besley's* construction were put upon this part of the section it would be rendered useless. It is no hardship on the publican to have to find out whether a man is drunk or not. I cannot help thinking that the word "knowingly" was purposely omitted. I quite agree with my brother STEPHEN that this conviction must be affirmed.

Conviction affirmed.

Although guilty knowledge or guilty intent is generally necessary in common-law offences, yet statutes often expressly or impliedly dispense with this element and make certain acts penal, whether done with guilty knowledge or not. Thus in Massachusetts a statute declared positively that "whoever sells, keeps, or offers for sale adulterated milk," shall be punished, &c., and under this and similar statutes it has frequently been held that the penalty was incurred without any knowledge of the adulteration, as where the seller had bought it for pure milk of other parties: *Commonwealth* v. *Farren*, 9 Allen 489; *Com'th* v. *Nichols*, 10 Allen 199; *State* v. *Smith*, 10 R. I. 258.

A similar rule was applied in *State* v. *Hartfiel*, 24 Wisc. 60, and *Ulrich* v. *The Commonwealth*, 6 Bush 400, as sales to minors of intoxicating liquors. See also *Barnes* v. *State*, 19 Conn. 398; *Beckham* v. *Nacke*, 56 Mo. 546, for marrying minors without the consent of their parents; while had the word "knowingly" been used the rule would be different: *Commonwealth* v. *Flannelly*, 15 Gray 195; *Commonwealth* v. *Boynton*, 12 Cush. 499. And it is familiar law that the statutes against selling intoxicating liquor are violated, although the vendor does not know it is intoxicating: *Com'th* v. *Boynton*, 2 Allen 160; *Com'th* v. *Goodman*, 97 Mass. 117; *Com'th* v. *Hallett*, 103 Mass. 452. So if a statute against selling veal declares, "whoever kills for sale, any calf of four weeks old, shall be punished," &c., it is not essential that the defendant know the age of the calf: *Commonwealth* v. *Raymond*, 97 Mass. 567. So of selling naphtha under some other name, contrary to a statute, imposing a penalty upon "any person who shall sell or keep for sale, naphtha, under any assumed name," the party may be guilty, although he was not aware it was naphtha, but thought it some other oil: *Commonwealth* v. *Wentworth*, 118 Mass. 441. In a complaint against a billiard saloon keeper for permitting a minor to play, it is not necessary to show that he knew him to be a minor, since the statute says, "the keeper of a billiard saloon, who admits a minor thereto, without the written consent of his parent or guardian, shall forfeit $10, &c.": *Commonwealth* v. *Emmons*, 98 Mass. 6. On the other hand some very respectable authorities adopt a different view.

Thus in *Birney* v. *The State*, 8 Ohio 230, the defendant was indicted for harboring and secreting a slave, under a statute "that if any person shall harbor or secrete any black or mulatto person, the property of another, the person so offending shall be fined, &c." No knowledge or guilty intent is made necessary by the statute, and the court held that knowledge should have been averred in the indictment and proved on the trial, the court saying: "We know

of no case where positive action is held criminal, unless the intention accompanies the act, either expressly or necessarily inferred from the act itself." See also *Miller* v. *The State*, 3 Ohio St. 475, in prosecutions for selling to minors, &c. And in *Stern* v. *State*, 53 Geo. 229, an indictment for allowing a minor to play at billiards, it was distinctly held, (quite contrary to *Com'th* v. *Evans*, *supra*) that the offence was not committed if the defendant acted in good faith and after reasonable inquiry as to the age of the person, though in fact he was under twenty-one. The language of the statute is not given in the report, but there is no intimation that the statute expressly requires positive knowledge of the age. A similar rule was applied in *Williams* v. *The State*, 48 Ind. 306, an indictment for selling intoxicating liquor to a person "in the habit of getting intoxicated." Evidence that the vendor believed and had reason to believe the vendee was a sober man and not in the habit of getting intoxicated was competent, though the contrary was true. This is in direct conflict with our principal case. The burden of proving good faith and cause to believe the buyer was a sober person, is said in Indiana to be on the seller. See *Farrell* v. *The State*, 45 Ind. 372.

The learned reader is referred to a very able article in favor of the view of our principal case, to be found in 12 Am. Law Review 469, by the late Judge WILDER MAY, and as supporting a contrary rule, to the note and cases cited by the late N. St. John Green, in *United States* v. *Anthony*, 2 Green Cr. Cas. p. 208, and Bishop's Crim. Law. While all agree it is a question of construction or intention of statute law, it is not easy to reconcile all the cases on the subject by any different phraseology used in the enactments.

EDMUND H. BENNETT.

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RECENT AMERICAN DECISIONS.

Supreme Court of Iowa.

STATE *v.* JONES.

Allowing a witness to answer a question only slightly leading, if at all, and which does not prejudice the party objecting, is not such error as will warrant a reversal.

Allowing a witness to answer a question calling for a conclusion of fact relevant to the case, such conclusion not being the ultimate fact to be found by the jury, is not error.

To render declarations admissible as a part of the *res gestæ*, it is not necessary that they should be precisely concurrent in point of time with the principal transaction. It is sufficient if they are near enough to clearly appear to be so spontaneous and unpremeditated and free from sinister motives, as to afford a reliable explanation of the principal transaction.

Questions asked upon cross-examination not tending to modify or explain the testimony of the witness given in chief, but to elicit testimony which would have the effect to discredit the testimony which the witness had given in chief; are not admissible as cross-examination.

Instructions must be based upon evidence and must not be misleading.

When the defence of insanity is interposed to an indictment for murder, evidence